Supreme Court, U.S.
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No. 86-1180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BERNICE RICHARD,

Petitioner,

—VS.—

JULIAN SHERRIER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was petitioner's motion to set aside the amended judgment (made more than one year after it was entered) time barred by the one-year limitation period set forth in Fed. R. Civ. P. 60(b)?

2. Did the District Court abuse its discretion in denying petitioner's renewed 60(b) motion?

3. Should this Court review a unanimous determination by the Second Circuit that petitioner's renewed motion was properly denied because it was untimely and because she failed to prove her allegations?

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PRELIMINARY STATEMENT

A. The Petition is Defective

The petition fails to comply with Rule 21.1(e) of this Court, which requires:

> "A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:
>
> ***
>
> (iv) The statutory provision believed to confer ... jurisdiction to review the judgment or decree in question by writ of certiorari.

Also omitted is the required Statement under Rule 21.1(i) showing the basis for original jurisdiction; and the

B. Petitioner's Questions Presented Contain False Assumptions

The foregoing defects aside, petitioner's first "Question Presented for Review" contains three material misstatements.

First, it falsely assumes that a finding of fraud was made. On the contrary, the Court of Appeals specifically found that petitioner "failed to establish convincingly the existence of fraud." (Pet. at A-3).*

Second, it states that the Court below decided that a judgment would be set aside "only if [the] fraud would change the entire outcome of the case...." (Pet. at i) The Court's decision is to the contrary. It stated:

> "2. ... the motion was properly denied on its merits. To prevail on a 60(b)(3) motion the moving party must (a) prove its assertion of fraud by clear and convincing evidence, ... [citations omitted] and (b) demonstrate that the perjured testimony 'may have played some part in influencing

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* "Pet." followed by page numbers or letters and numbers refers to the indicated page of the Petition or Appendix to the Petition.

> the court to render a judgment,' ... [citations omitted] Thus, while this equitable doctrine does not require a showing that the fraud necessarily affected the judgment, a finding that the fraud did not affect the judgment precludes relief." (Pet. at A-2-3).

In short, if the alleged fraud did not play any part in influencing the court no relief should be granted.

Third, as is demonstrated in Point I, infra, petitioner falsely claims that there is a conflict in the Circuits in interpreting Fed. R. Civ. P. 60(b)(3).

C. There are no Special and Important Reasons to Grant the Petition

By any reading of the facts of this case, it is clear that petitioner is a bitter woman seeking revenge because of the unfortunate termination of a business and romantic relationship with re-

spondent, and will spare no expense to accomplish her single-minded goal. Since entry of the original judgment in 1983, there have been four unsuccessful appeals (only two were perfected) and numerous depositions and other frivolous motions -- all reflected in 156 additional docket entries in an 18 page docket. None of petitioner's allegations (no matter how distorted) present "special and important reasons" warranting review by this Court.*

COUNTERSTATEMENT OF THE CASE

I. Introduction

Plaintiff and defendant met in 1978. They had a brief romantic and

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* Since both unanimous opinions by the Second Circuit are unreported, that Court obviously did not believe that petitioner's claims presented "special and important" considerations.

business relationship which terminated in 1980. This action was commenced in June 1982. It involved disputed ownership claims to four sculptures purchased for a joint venture between the parties and to a fifth, given as collateral for a loan. It was tried in October 1982, after extensive pre-trial discovery. Each party was deposed for five days, as were eight non-party witnesses. Hundreds of financial records and other documents were produced. There were 1,800 pages of trial transcript and more than 100 exhibits. After the original decision* petitioner unsuccessfully moved to set aside the judgment (Pet. at F-1-F-7). The denial of this motion was unanimously affirmed by the Second Cir-

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* That decision is oficially reported. Sherrier v. Richard, 564 F. Supp. 448 (S.D.N.Y. 1983).

cuit (Pet. at D-1-D-4). After three years of extensive post-judgment discovery another unsuccessful 60(b) motion was made (Pet. at B-1-B-9). That decision (the subject of this proceeding), was unanimously affirmed (Pet. at A-1-A-3).

Petitioner's renewed motion presented nothing new to discredit the District Court's original findings concerning the joint venture -- which were based upon the testimony of disinterested trial witnesses (including defendant's) and other documents. As noted by the Second Circuit:

> "The decision on the ownership of the other Buddhas is similarly supported by the testimony apart from that of Sherrier. Given the independent evidence for the district court's conclusions, and given the fact that Judge Sweet had never placed complete reliance on Sherrier's testimony, we conclude that the court did

> not abuse its discretion in deciding to amend its judgment rather than to set it entirely aside." (Pet. at D-2-D-3).

Petitioner's claim that she was defrauded is belied by the fact that she:

> (a) invested approximately $342,000* in the venture and received a one-half interest in four Buddhas worth $1,100,000;*
>
> (b) was repeatedly offered a refund of all sums invested; and
>
> (c) was voluntarily given collateral worth more than twice the amount of the loan.

How could she have been defrauded when, after considering her loan and investments (less than $500,000) five sculptures worth in excess of $1,500,000 were delivered to her home? One doubts

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* These sums were substantiated at trial and are reflected in the amended judgment, which is part of the Record on Appeal in petitioner's first and second appeal.

that there is another case in the Federal system or those of the 50 states, in which an alleged "con-artist" delivered to a "defrauded party" merchandise worth more than three times the value of the sums received.

Thus, it is clear that petitioner's fraud claims were uniformly rejected by the District Court and the Second Circuit. All petitioner inconclusively established was that: (a) two Pakistani witnesses (predictably) denied participation in transactions which are illegal in Pakistan; and (b) two collateral trial exhibits had inauthentic signatures. Balanced against those not very startling revelations were the facts that:

(a) respondent did not prepare, witness or participate in the preparation of the two challenged exhibits, and only identified the signature on

them "to the best of his recollection";

(b) the exhibits were admitted into evidence "with real reservations" and played no part in the District Court's findings, conclusions, and amended judgment;

(c) there was independent evidence proving the transactions described on the exhibits, and the values indicated; and

(d) six prominent London art dealers, a well-known U.S. dealer, and two members of the U.S. Consulate acknowledged that Pakistani citizens would deny participation in the described transactions (especially when testifying in Pakistan).

Given the foregoing, the more than one hundred other exhibits introduced into evidence, and that the other witnesses and documents supported the District Court's findings, it is not surprising that petitioner's two attempts to set aside the judgment were uniformly rejected.

Finally, in response to petition-

er's somewhat hysterical hypothetical:

> "Is fraud in or out of Rule 60(b)(3)?" (Pet. at 7),

suffice it to state that there was a specific finding that there was no fraud:

> "... Richard's circumstantial evidence failed to establish convincingly the existence of fraud.... No evidence demonstrated that the forged signature was in any way attributable to Sherrier." (Pet. at A-3, see also B-10).

Her other unsupported assertions of "theft" "cheating" "stealing" and "perjury" are also contradicted by the record.

II. Post-Judgment Corroboration of the Transactions

Following petitioner's first unsuccessful motion, additional evidence was presented, which supported the District Court's original findings:

A. One exhibit* showed a wire transfer by respondent into the account of the Pakistani vendor of the sculptures, who later swore that he did not know respondent and never transacted business with him (Pet. at B-5);

B. Another* showed a wire transfer to the account of another participant in the transaction (Pet. at B-5);

C. A November 22, 1980 letter* from one of the participants referred to the transactions that were the subject of the lawsuit (Pet. at B-5 and B-8);

D. A statement signed by six prominent London Art Dealers* confirmed the business relationship between respondent and the vendor; and

E. An affidavit from a solicitor of the Supreme Court of England* also confirmed the transactions.

The District Court obviously considered this additional evidence when it concluded:

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* This document is part of the Record on Appeal in petitioner's second appeal.

> "Indeed it is possible that Siddick [the vendor] was the only person responsible for his forged signature as a means of avoiding attesting to a document setting forth illegal conduct." (Pet. at B-4) and
>
> * * *
>
> Siddick's own denials of his relationship with Sherrier are of little or no probative value, since it has been established that the transactions at issue are illegal under the law of Pakistan and given the severe penalties attendant to such crimes, a Pakistan dealer would be loath to admit to them. Moreover, Sherrier has demonstrated a bank transfer of funds to Siddik in 1982, and has produced the declaration of a money lender, ... who independently confirms the transactions.... (Pet. at B-5)

III. The Parties

A. Julian Sherrier

Although repeatedly called a "con artist and fraud" by petitioner, respondent is an internationally recognized

and respected art dealer. He has been consulted by the Metropolitan Museum of Art, the Los Angeles County and Berlin Museums, and has lectured and presented published papers at Cambridge, Oxford, Heidelberg and Amherst Universities.

B. Bernice Richard

As noted by the trial judge, petitioner's testimony was also not entirely credible. He rejected an alleged cash payment by her for another sculpture because it was totally unsupported*. He also rejected her claim to be a partner in the collateral for the loan because her testimony was directly contradicted by her own witnesses**.

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* Sherrier v. Richard, 564 F. Supp. 448, 453-454 (S.D.N.Y. 1983).

**Sherrier v. Richard, supra at 454-455.

IV. The Underlying Transactions

A. The Loan

In April, 1979, petitioner loaned respondent $127,000. Respondent gave her two signed loan receipts and collateral worth more than twice the loan. Based upon the testimony of two of petitioner's witnesses, her claim that this loan was converted to a partnership interest was properly rejected.

B. The First Acquisitions

During April, 1979, the parties agreed to purchase Gandharan Art for resale. Petitioner was to furnish the capital and respondent the skill, experience and contacts.

Petitioner wired respondent $52,000 for a deposit to hold a collection in Karachi. Respondent testified that he

delivered these funds to the owners of the collection. When petitioner later expressed reservations about the purchases, respondent offered to return her funds. She rejected his offer.

Respondent then went to Peshawar, Pakistan and purchased two sculptures, which, when delivered to petitioner's residence, had a fair market value of between $390,000 and $525,000*

C. **The Second Acquisitions**

In July 1980 the parties agreed to acquire additional sculptures. Respondent returned to his original source in Peshawar and purchased two more sculptures for $250,000.

Although petitioner agreed to pay this price, she later reneged. Thereaf-

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* Sherrier v. Richard, supra at 459.

ter, respondent paid the outstanding balance plus interest and fines. When the sculptures were delivered to petitioner's residence, they had a fair market value of between $700,000 and $800,000.*

D. Independent Proof of the Joint Venture and the Cost and Value of the Purchases

The District Court's findings of a joint venture and the cost and value of the sculptures purchased are supported by petitioner's and respondent's witnesses and other documentary evidence, as well as the uncontradicted testimony of two experts (Pet. at D-2-3 and F-6)**.

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* Sherrier v. Richard, supra at 459.

**See also Sherrier v. Richard, supra at 451, 454 and 456.

VI. The Post-Judgment Testimony About The $50,000 Deposit

In violation of two confidentiality orders and a stipulation, petitioner told the family to whom respondent testified that he had given the $52,000 that:

> "...they were involved in a lawsuit; that it was a matter of public record ... that they were involved in the commission of what appeared to be a crime in their country, ..."*

These statements were false. They were not "involved in a lawsuit" and their alleged roles were not "a matter of public record".

Although the District Court's findings concerning this testimony must be accepted, because of the strong motives

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* The foregoing is taken from page 55 of the post-judgment deposition of respondent.

to deny participation in these transactions and the unlawful manner in which the testimony was procured, its probative value was marginal at best.

Indeed, the District Court's later conclusions that:

> (a) Siddik [the vendor] may have been "the only person responsible for his forged signature ... [to] avoid attesting to illegal conduct." (Pet. at B-4); and
>
> (b) "Siddik's ... denials of his relationship with Sherrier are of little or no probative value" because the transactions were illegal, (Pet. at B-5)

are equally applicable to these denials.

POINT I

THE SECOND CIRCUIT'S APPLICATION OF FED. R. CIV. P. 60(b) IS CONSISTENT WITH THAT OF THE OTHER CIRCUITS

The Second Circuit's application of Rule 60(b) is consistent with the other circuits. Under the prevailing standard a district court's decision should only be set aside upon a clear showing of an abuse of discretion. Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1181 (10th Cir. 1981), cert. den., 464 U.S. 824 (1983); Matter of Emergency Beacon Corp., 666 F.2d 754, 760-761 (2nd Cir. 1981); Square Construction Co. v. Washington Metropolitan Area Transit Authority, 657 F.2d 68, 71 (4th Cir. 1981); H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115, 1122 (6th Cir. 1976); Peacock Records, Inc. v. Checker

Records, Inc., 365 F.2d 145, 148 (7th Cir. 1966); cert. den., 385 U.S. 1003 (1967); Atchinson, Topeka & Santa Fe Ry Co. v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957).

This was specifically recognized by the Second Circuit when it twice unanimously affirmed the District Court's decisions:

> "Our review of a motion under Rule 60(b) is limited to a determination whether the District Court acted within its discretion. (Pet. at A-3)
>
> * * *
>
> In general, [a] motion under Rule 60(b) is addressed to the sound discretion of the trial court, and the appellate courts are 'restricted to determining whether the [district] court abused its discretion." (Pet. at D-2).

In applying this standard it is well settled that:

> "An abuse of discretion is established only where no reasonable man could agree

> with the District Court; if reasonable men could differ as to the propriety of the Court's action, no abuse of discretion has been shown." Smith v. Widman Trucking & Excavating, Inc., 627 F.2d 792, 796-797 (7th Cir. 1980).

In order to prove that there was an abuse of discretion, the party challenging the judgment must prove: (a) the allegations by clear and convincing evidence, and (b) that the misconduct complained of prevented the full and fair presentation of a claim or defense. Square Construction Co. v. Washington Area Transit Authority, 657 F.2d 68, 71 (4th Cir. 1981); Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir. 1978), reh. den., 578 F.2d 871 (5th Cir. 1978).

In Rozier, supra, Ford willfully failed to produce a key inculpatory report in response to a discovery request.

The issue in Rozier was not collateral, but central to Ford's liability (id. at 1345) and the district court gave no reasons for denying the motion (id. 1346).

Both Rozier, supra, and Square Construction Co., supra, are distinguishable because each involved "clear and convincing proof" of a willful failure to disclose material information, which prevented the moving party from presenting its case at trial.

Here, petitioner did not prove her allegations "by clear and convincing evidence" (Pet. at A-2). In addition, she was not prejudiced in presenting her defense at trial. The Second Circuit expressly found that petitioner failed to establish (convincingly or otherwise) that the respondent participated in any fraud:

> "... Richard's circumstantial evidence failed to establish convincingly the existence of fraud. Moreover, no evidence demonstrated that the forged signature was in any way attributable to Sherrier." (Pet. at A-3).

As noted by the Ninth Circuit:

> "Where perjury has played some part in influencing the court or jury to render a judgment, the effect of the perjury will not be weighed on a motion to set aside the judgment.
>
> The difficulty here, is the factual question - was there perjury? And was the judgment obtained by fraud, misrepresentation or other misconduct of plaintiff?
>
> * * *
>
> Such a motion ... is directed to the sound discretion of the trial court, and particularly to the discretion of the trial judge who 'presided in the litigation .... Not only must there be clear and convincing evidence of fraud, but it must be such as prevented the losing party from fully and fairly presenting his case or defense.... The trial judge saw and heard the

> plaintiff; ... He saw or heard the other matters relied on by appellant; he felt the 'climate' of the trial. The trial judge found no fraud nor misrepresentation." Atchinson, Topeka & Santa Fe Ry. Co. v. Barret, 246 F.2d 846, 849 (9th Cir. 1957).

Even where a party admits giving false testimony (which is not this case), the judgment should not be disturbed if: (a) the remainder of the party's testimony was truthful, and (b) the testimony is corroborated by other independent evidence. Phillips v. Crown Central Petroleum Corp., 602 F.2d 616, 623 (4th Cir. 1979) cert. den., 444 U.S. 1074 (1980).

In this case the trial judge reconsidered all of the evidence absent the "challenged exhibits" and determined that the judgment:

> "... rest[ed] on solid footings established at trial regarding the existence of a

> joint venture between the two principals and the validity of the prices paid as established by independent expert testimony." (Pet. at B-10)

Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145 (7th Cir. 1966) cert. den., 385 U.S. 1003 (1967) is inapposite. There the proof of perjury was unquestionable -- consisting of sworn statements by three witnesses, recanting material and controlling trial testimony. Here, respondent has repeatedly reaffirmed the truthfulness of his trial testimony, which was supported in part by the testimony of petitioner's own witnesses, and by other independent testimony and documentation.

Bros. Inc. v. W.E. Grace Mfg. Co., Inc., 351 F.2d 208 (5th Cir. 1965), cert. den., 383 U.S. 936 (1966) is not only inapposite, but supports respondent's position. In that case the Fifth

Circuit specifically noted that the false document "had a decisive impact" on the court which, relied on "its literal truth". Id. at 211.

> "... [H]ad the truth ... been disclosed quite a different result might have come about." Id.

In this case the opposite is true:

> "... a reconsideration of the evidence absent the forged exhibits ... [was] conducted (Pet. at B-10).

Following such reconsideration the District Court found that the judgment still rested "on solid footings." (Pet. at B-10).

POINT II

PETITIONER'S MOTION WAS TIME BARRED BY THE ONE-YEAR LIMITATION PERIOD SET FORTH IN FED. R. CIV. P. 60(b)

The amended judgment was entered on June 25, 1984. Petitioner's renewed motion was made on August 15, 1985 -- more than one year later. The District Court did not -- indeed, could not -- extend the time to move under the Rule. All it did was state that, after additional evidence was adduced during post-judgment discovery, a motion could be made (Pet. at F-7). This, of course, could only mean a "timely" motion.

Fed. R. Civ. P. 60(b) in pertinent part provides:

> "[t]he Court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: ... misrepresentation or other misconduct of an adverse party

> .... the motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment...."

The Rule's time limitation is absolute. No motion under clause (3) can be brought after one year. In Ackermann v. United States, 340 U.S. 193, 197 (1950) it was held that a motion based on Rule 60(b)(1) must:

> "by the Rule's terms, be made not more than one year after the judgment was entered." Accord, U.S. v. Marin, 720 F.2d 229, 231 (1st Cir. 1983).

Similarly in Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 701-702 (2d Cir. 1972) cert. den., 409 U.S. 883 (1972), reh. den., 409 U.S. 1029 (1972) the Second Circuit stated that:

> "Motions pursuant ... Rule 60(b)(3) ... must be made within one year after the judgment was entered, ..." Accord, Rozier v. Ford Motor Co., 573 F.2d 1332 (5th

Cir. 1978), reh. den., 578 F.2d 871 (5th Cir. 1978).

The reason for the one-year limitation is obvious. As noted in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944):

> "Federal Courts ... long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. (citation omitted) This salutory general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered."

Although the current rule substitutes a one-year limitation period for the earlier "term rule" it nevertheless still demonstrates the strong policy favoring an end to litigation.

Petitioner's claim that she made the motion at the earliest possible time is untrue. She could have made a timely

motion under the Rule, as all of the facts and circumstances upon which her renewed motion were based related to facts which were within her knowledge long before the expiration of the one year limitation period.

CONCLUSION

Because petitioner's renewed motion was untimely, was properly denied on the merits, and raised no special and important issues, her Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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